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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No.

DAVID MOOR, *Petitioner*

VS.

FRANK I. MADIGAN; GLEN DYER; THOMAS L. HOUCHENS; LOUIS SANTUCCI; LAWRENCE L. RICHE; and COUNTY OF ALAMEDA, *Respondents*

WILLIAM DONOVAN RUNDLE, JR., a minor by WILLIAM D. RUNDLE, his guardian ad litem; WILLIAM D. RUNDLE and SARAH RUNDLE, *Petitioners*

VS.

FRANK I. MADIGAN; GLEN DYER; THOMAS L. HOUCHENS; LOUIS SANTUCCI; LAWRENCE L. RICHE; and COUNTY OF ALAMEDA, *Respondents.*

BRIEF IN OPPOSITION

QUESTIONS PRESENTED

As stated by the Ninth Circuit Court of Appeal:

> Three broad issues are thus presented by appellants. First, they argue that their Civil Rights Act claims against the County are viable, notwithstanding the fact that the County is not a "person" within section 1983 of the Act. Second, they contend that even if they did not present a cognizable federal cause of action against the County, the district court should have retained jurisdiction of the pendent state claims against the County. Finally, appellant Moor argues that the County is a "citizen" for federal diversity jurisdiction purposes.

I

NO COURT HAS HELD THAT A STATE, OR ITS SUBDIVISION, MAY BE SUED UNDER 42 USC SECTIONS 1981-88

Since *Monroe v. Pape,* 365 U.S. 167 (1961), every court considering the question has held that the Ku Klux Klan Act may not be used to impose vicarious liability on a state or its political subdivisions. *See,* e.g., *Ries v. Lynskey,* 452 F.2d 172 (7th Cir. 1971); *Yumich v. Cotter,* 452 F.2d 59 (7th Cir. 1971); *Davis v. United States,* 439 F.2d 1118 (8th Cir. 1971); *Hill v. City of El Paso, Texas,* 437 F.2d 352 (5th Cir. 1971); *Zuckerman v. Appellate Div. Sec. Dept.,* S.Ct. of St. of N.Y., 421 F.2d 625 (2d Cir. 1970); *United States ex rel. Gittlemacker v. County of Philadelphia,* 413 F.2d 84 (3d Cir. 1969), cert. denied, 396 U.S. 1046 (1970); *Brown v. Town of Caliente,* 392 F.2d 546 (9th Cir. 1968).

Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971) does not represent a conflicting *holding.* As pointed out by the court below and in *Ries v. Lynskey,* 452 F.2d 172, 175 (7th Cir. 1971), *Carter* dealt with a *Federal* and not a state entity.

Respondent respectfully suggests that there is no real conflict in the decisions, that the analysis of the Seventh and Ninth Circuits on this point is correct, and that intervention by this court is not required.

Since *Monroe v. Pape,* 365 U.S. 167, 191 (1961) held that public entities could not be sued under the 1871 Act, Congress has several times passed major civil rights legislation without changing that rule. States have undoubtedly relied upon the rule in formulating their immunity statutes. To judicially change the rule now is unnecessary and would upset the intended scope of the involved state and federal statutes.

II

PENDENT JURISDICTION WAS NOT AVAILABLE TO PETITIONERS AS A VEHICLE TO BRING AN ADDITIONAL PARTY INTO THE LAWSUIT EITHER AS A MATTER OF POWER OR BY THE EXERCISE OF DISCRETION

Petitioners have asked the courts below, and ask this court, to extend federal jurisdiction beyond constitutional or Congressional grants.

> "Pendent jurisdiction," as the term has been used in this section, refers only to the joinder of state and federal claims. . . . The pendent jurisdiction concept applies only where the same par-

> ties are involved on the state and federal claims. It does not permit bringing in an additional party to respond to a state claim on the ground that a claim is closely related to the federal claim against an existing party. Wright, *Federal Courts,* 65 (2d ed. 1970).

See also 3A *Moore's Federal Practice* (Supp.) ¶18.07; Shakman, *The New Pendent Jurisdiction of the Federal Courts,* 20 Stan. L.Rev. 262 (1968).

Here, there is *no basis* for federal jurisdiction as to the county and no Congressional or constitutional authority for extension of federal power to hear only a state law cause of action against that public entity.

United Mine Workers v. Gibbs, 383 U.S. 715 (1966) held only that where federal jurisdiction independently exists as to a party, additional related claims against that party may be heard. *Hatridge v. Aetna Casualty & Surety Co.,* 415 F.2d 809 (8th Cir. 1969) is equally limited since the party in question was already before the court in a related and consolidated case. As the court there held at p. 816:

> We conclude that the Hatridge claims are so intertwined and so interdependent that federal jurisdiction of the primary claim appropriately promotes and supports federal jurisdiction of the other or, perhaps more accurately, prevents separation of the two for forum shopping purposes.

The other case upon which petitioners principally rely, *Astor-Honor, Inc. v. Grosset & Dunlap, Inc.,* 441 F.2d 627 (2d Cir. 1971) specifically held at p. 630

that the pendent jurisdiction point was not being decided since the court had jurisdiction by virtue of 28 U.S.C. §1338(b).

Further, on the facts of *this* case, after complete briefing, both the District Court and the Ninth Circuit Court of Appeals felt that as a matter of discretion, pendent jurisdiction was not appropriate. The District Court stated in this regard:

> Moreover, on the issue of the court's *discretion* to adjudicate the pendent claim, there would still be substantial doubts as to whether the state claim should be heard. The present action will be tried to a jury, and with the introduction of a claim against the County under the California Tort Claims Act, with the special defenses available to the County, the case could become unduly complicated. Further, this court would be called upon to resolve difficult questions of California law upon which state court decisions are not legion. See *United Mine Workers v. Gibbs,* 383 U.S. 715, 726-27 (1966); Shakman, *The New Pendent Jurisdiction of the Federal Courts,* 20 Stan.L.Rev. 262, 265-66 (1968). *Rundle v. Madigan,* 331 F.Supp. 492, 495 (N.D. Cal. 1971).

It is therefore unnecessary on the particular facts of this case to consider whether the court had the power to hear the state claim. *Patrum v. City of Greenburg,* 419 F.2d 1300 (6th Cir. 1969), cert. denied, 397 U.S. 990 (1970).

III

THE COUNTY IS NOT A CITIZEN OF THE STATE OF CALIFORNIA

The Ninth Circuit has twice ruled that in California counties are not citizens for purposes of diversity jurisdiction. Whatever may be the rule for counties of other states, or for municipal corporations, on the facts presented here to the courts below it is clear that the County of Alameda is merely a subdivision of the state and not a citizen.

Because the court below did not engage in an extended discussion in its opinion on whether the county here was sufficiently corporate under federal law to be a "citizen" does not make the court's decision incorrect or warrant petitioner's accusation that the court ignored a mandate of this court.

Petitioners are simply asking this court to re-evaluate the facts presented below in a question of significance only to California counties.

CONCLUSION

This case does not have the significance petitioners seek to impart to it. Since the Ku Klux Klan Act was enacted a century ago, it has consistently been held not to encompass suits against the state or its agencies. The only decision even questioning that tenet is *Carter v. Carlson,* 447 F.2d 358 (D.C. Cir. 1971) which dealt with a federal entity and which is therefore distinguishable.

The Ninth Circuit Court of Appeal correctly held that *United Mine Workers v. Gibbs,* 383 U.S. 715 (1966) did not authorize forcing a defendant to litigate in Federal Court where there is no basis for federal jurisdiction against that defendant. In any event, a *Gibbs* analysis by the courts below shows that as a matter of discretion pendent jurisdiction was not appropriate on the facts of this case. The question of citizenship for diversity jurisdiction is equally factual, turning upon an analysis of the particular state-county relationship.

Thus, as to the jurisdiction issues, petitioners simply seek a re-analysis of factual determinations by the courts below.

The petition for certiorari should be denied.

Dated, Oakland, California,
July 24, 1972.

Respectfully submitted
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CROSBY, HEAFEY, ROACH & MAY,
Counsel for Respondents.